

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

**Complaint of Fiber Technologies
Networks, LLC**

D.T.E. 01-70

**Motion of Shrewsbury's Electric Light Plant
to Compel Responses to Information Requests**

Pursuant to 220 C.M.R. 1.06(6)(c)(4) and for the reasons stated herein, Shrewsbury's Electric Light Plant ("SELP") moves that the Department of Telecommunications and Energy ("Department" or "DTE") compel Fiber Technologies Networks, LLC ("Fibertech") to respond to certain information requests set out below.

On November 2, 2001, pursuant to the Hearing Officer's Procedural Order in the above-captioned proceeding, SELP issued its first round of information requests. The purpose of these requests was to elicit information that would assist SELP and its attorneys to better understand Fibertech's Complaint, which is the subject of this proceeding, to refine the scope of issues to be discussed in SELP's prefiled direct testimony in response to the Complaint and to prepare its examination of Fibertech at the hearings requested by Fibertech and ordered by the Department. The Procedural Schedule was developed based on the understanding that Fibertech and SELP would answer fully all information requests within the time period provided for by the Hearing Officer so that the Department might issue a decision regarding Fibertech's Complaint within 180 days as required by 220 C.M.R. 45.08.

Complete responses to information requests are absolutely essential to the efficient and effective administration of this case. As discussed in greater detail below, the failure of

Fibertech to provide complete answers to five of SELP's initial information requests places both the Department and SELP in the untenable position of trying to complete this case within the prescribed regulatory timeline without receiving necessary information from Fibertech in a timely manner.

Specifically, SELP moves that the Department compel Fibertech to respond completely to the following information requests for the reasons which follow below.

Information Request

SELP 1-6 Please refer to Paragraph 4 of the Complaint.

(a) Does Fibertech currently have any signed leases for its "dark fiber for use by communications carriers?"

(b) If so, please provide copies of such leases.

RESPONSE: (a) Yes. See Testimony of Frank Chiaino, Page 3, Paragraphs 18-23, Page 4, Paragraphs 2-19.

(b) Fibertech objects to producing such leases on the grounds that they are irrelevant to the issues in dispute and that certain of these leases are competitively sensitive and therefore confidential. These leases are for dark fiber, and since there is no dispute that Fibertech is a dark fiber carrier and it is SELP's position that a dark fiber carrier is not a "licensee" within the meaning of G.L. c. 166 § 25A, the leases are therefore immaterial. In this light, the burden of seeking protective treatment or obtaining authorization from Fibertech's customers to produce outweighs any marginal probative value of these leases. Fibertech further objects to producing leases of customers that do not do business in Massachusetts.

Legal/Factual Argument

This request asks Fibertech to provide copies of any leases for its "dark fiber for use by communications carriers." In its November 13, 2001 "response" to this information request, Fibertech "objects to producing such leases on the grounds that they are irrelevant to the issues in dispute and that certain of these leases are competitively sensitive and therefore confidential." SELP is hard pressed to understand how these leases are irrelevant when Fibertech opened the door on discovery of such leases via the prefiled direct testimony of two its witnesses, Frank Chiaino and Scott Lundquist. Both testimonies specifically set forth as part of Fibertech's direct case that Fibertech has executed such agreements and contracts. It is untenable for Fibertech to provide testimony regarding the existence of such agreements and then refuse to provide the

Department and SELP with copies of these leases. Here, where Chiaino's testimony and discovery responses (i.e., response to SELP 1-11) appear to attempt to establish that Fibertech actually offers local exchange voice, interexchange and data services directly to customers, the Department and SELP must be afforded the opportunity to review these agreements and contracts to derive information regarding the nature and scope of any such services, the types of customers involved, and the nature of agreements between Fibertech and its customers.

Fibertech also argues that "[T]hese leases are for dark fiber, and since there is no dispute that Fibertech is a dark fiber carrier and it is SELP's position that a dark fiber carrier is not a "licensee" within the meaning of G.L. c. 166, § 25A, the leases are therefore immaterial." This particular argument is internally inconsistent and defies logic. First, in making its argument that Fibertech is not a "licensee" under G.L. c. 166, § 25A and that the Department could adjudicate Fibertech's Complaint on the pleadings alone, SELP did not concede or otherwise limit its right to issue discovery requests. Certainly, the Hearing Officer's October 26, 2001 Procedural Memorandum places no such limits on SELP's discovery rights. While SELP argued in this case that the Department could adjudicate Fibertech's Complaint on the pleadings alone, the Hearing Officer ultimately ruled that an evidentiary hearing "may assist the Department in resolving this complaint." October 26, 2001 Procedural Memorandum at 3. Interestingly, Fibertech believes that the Department's decision to allow discovery and hold hearings in this case has placed Fibertech in a unique and unprecedented "win-win" position, one in which Fibertech can prevail in its efforts to seek an adjudicatory hearing on its Complaint, and, at the same time, may strip SELP of its rights to issue discovery because SELP initially argued that such discovery might be unnecessary. If Fibertech wishes to introduce certain factual issues into this dispute, then it must be prepared to permit discovery on them. Fibertech's argument is without merit since SELP has the right to discovery on Fibertech's case as the Department has specifically provided for in the Hearing Officer's ruling on the procedural schedule.

Further, Fibertech's argument that these leases (or agreements or contracts) are "irrelevant" is off the mark. At this stage of the Department's adjudicatory process, it is not necessary for the issuer of information requests to establish that the information sought is "relevant" (although as set forth above, Fibertech's actions in this case have demonstrated they most certainly are relevant.) Rather, the information sought need only be "discoverable," a far lesser standard. Even inadmissible information is discoverable if it is reasonably calculated to lead to the discovery of admissible evidence. 220 C.M.R. 1.06(6)(c); Mass.R.Civ.P. 26(b)(1). Western Massachusetts Electric Company, D.P.U. 92-8C-A at 31 (1993).

Of course, neither the Department nor SELP can judge the relevancy of these agreements at this time without reviewing these documents. For example, SELP would be interested in learning whether these leases (or agreements or contracts) require Fibertech's "customers" to make payment or take service as of the date of execution of the contract, or at some later date, i.e., when the fiber is "lit." These documents could provide information which would help the Department determine if Fibertech indeed transmits intelligence by telephone, television or electricity as is required under G.L. c. 166, § 25A. This type of information and other information regarding the nature of Fibertech's relationship(s) with its customers may well prove helpful to the Department in adjudicating Fibertech's Complaint. Without the production of these leases (or agreements or contracts) – the existence of which are touted by Fibertech in its

prefiled direct testimony -- the Department and SELP can learn nothing about the nature of Fibertech's relationship(s) with its "customers" and the services that its actually provides over its dark fiber or whether it is transmitting intelligence over dark fiber.

Finally, Fibertech's arguments that these documents are competitively sensitive and confidential provide no basis for not providing these documents. SELP is more than willing to execute a reasonable non-disclosure agreement with Fibertech that would allow Fibertech to produce these documents. In addition, as set forth in TELRIC Investigation (Interlocutory Order), D.T.E. 01-20, at 30-38 (October 18, 2001), Fibertech must provide in discovery background information regarding the evidence it intends to present.

Information Request

SELP 1-7: Please provide all copies of all documents concerning Fibertech's "dark fiber" customers, including terms and conditions and rates for services offered.

RESPONSE: Please see Response to SELP 1-6. To the extent that this calls for documents beyond those called for in SELP 1-6, Fibertech objects to the requests as vague, burdensome, and not relevant. Fibertech further objects that the request calls for confidential marketing material.

Legal/Factual Argument

This request asks Fibertech to provide copies of all documents concerning Fibertech's "dark fiber" customers, including terms and conditions and rates for services offered. In its response, Fibertech refers to its arguments made in response to SELP 1-6 and objects to this request (SELP 1-7) as "vague, burdensome and not relevant." Fibertech also argues that this request "calls for confidential marketing material." Accordingly, SELP repeats and incorporates by reference its arguments with respect to compelling Fibertech's response to SELP 1-6.

Information Request

SELP 1-8: Please provide copies of all documents concerning Fibertech's local exchange voice, interexchange and data services customers.

RESPONSE: Please see responses to SELP 1-6 and 1-7.

Legal/Factual Argument

This request asks Fibertech to provide copies of all documents concerning Fibertech's local exchange voice, interexchange and data services customers. In its response, Fibertech merely refers to its arguments made in response to SELP 1-6 and 1-7.

Here, SELP repeats and incorporates by reference its arguments with respect to compelling Fibertech's responses to SELP 1-6 and SELP 1-7. Moreover, SELP notes that if one

reviews Fibertech's responses to SELP 1-6, 1-7, and 1-8 *in toto*, it is notable that Fibertech has not only failed to provide copies of its agreements with "customers", but also has avoided providing any information as to whether its "customers" are local exchange voice, interexchange and/or data services customers. Given Fibertech's direct case, its failure to provide discovery on this is perplexing and indefensible.

Information Request

SELP 1-12: Please refer to Paragraph 4 of the Complaint. Please provide all documents, including any business plans, internal memoranda, and promotional materials concerning the "market conditions and economics" that would lead Fibertech to offer local exchange voice and data services.

RESPONSE: Fibertech objects to this request insofar as it presumes that Fibertech does not currently offer local exchange voice and data service. Since SELP's position is that Fibertech's dark fiber offering is not local exchange or interexchange service, Fibertech objects to producing documents relating to any additional services it may provide as irrelevant. Fibertech further objects to producing such documents on the grounds that certain of these documents contain competitively sensitive and proprietary information and are therefore confidential. In this light, the burden of seeking protective treatment outweighs any marginal probative value of these documents.

Legal/Factual Argument

This request asks Fibertech to provide all documents, including business plans, internal memoranda, and promotional materials concerning the "market conditions and economics" that would lead Fibertech to offer local exchange voice and data services. Fibertech objects to this information request because "it presumes that Fibertech does not currently offer local exchange voice and data service." Fibertech also argues that responses to this discovery request would be irrelevant because SELP's position is that a dark fiber offering is not local exchange or interexchange service. Finally, Fibertech argues that the information sought contains competitively sensitive and proprietary information and is therefore confidential.

Once again, in an attempt to avoid producing discoverable documents, Fibertech has cobbled together a number of arguments that are without merit. First, to the extent that SELP's information request presumes anything - - which it does not - - such a presumption comes from Fibertech's own direct case. The August 27, 2001 Affidavit of Mario R. Rodriguez clearly states "[A]s market conditions and economics dictate, Fibertech intends to supplement these offerings with additional services including local exchange voice and data services throughout the service territory of Verizon and long distance services throughout the Commonwealth of Massachusetts." Rodriguez Affidavit at 2. As such, SELP is only seeking information from Fibertech which supports Fibertech's own statements regarding its plans for the future. Fibertech has opened the door to questions on this topic by making it part of its direct case. SELP also seeks discovery that might assist it in clarifying statements made by Fibertech's witnesses to date in this case that appear to be conflicting. Cf., Response (by F. Chiaino) to SELP 1-11. Second,

SELP's right to issue discovery in this case is in no way limited by positions taken by SELP up to this point. Here, SELP's position regarding whether "dark fiber" offering constitutes local exchange or interexchange service has absolutely no bearing on SELP's right to issue discovery regarding statements made by Fibertech in this regard. Finally, as discussed with respect to SELP 1-6 through 1-8, above, Fibertech may not simply refuse to provide documents because it deems them to be proprietary or competitively sensitive.¹ SELP is more than willing to execute a reasonable non-disclosure agreement with Fibertech that would allow Fibertech to produce these documents.

Information Request

SELP 1-13: Please refer to Paragraph 27 of the Complaint. Does Fibertech currently offer cable television service to end users in Massachusetts?

(a) If not, please provide all documents, including business plans, internal memoranda and promotional materials, if any, concerning Fibertech's intention to offer cable service to end users in Massachusetts.

(b) Also, provide all documents concerning applications, licenses, approvals and franchises applied for by Fibertech in connection with the provision of cable television service.

RESPONSE: No.

(a) See Response to SELP 1-12.

(b) Not applicable.

Legal/Factual Argument

This request seeks all documents, including business plans, internal memoranda and promotional materials, if any, concerning Fibertech's intention to offer cable service to end users in Massachusetts. In its response, Fibertech states that it does not currently offer cable services to end users in Massachusetts. However, with respect to its intention to offer cable service to end users in Massachusetts in the future, Fibertech simply refers to its response to SELP 1-12.

Here, SELP repeats and incorporates by reference the arguments presented above with respect to SELP-12, and, in addition, notes that in paragraph 27 of its Complaint, Fibertech itself alleges that SELP, as operator of a CATV system, "will compete with the services offered over the facilities Fibertech will install..." Complaint at 9. Furthermore, with respect to Fibertech's response to SELP 1-13(a), if no such documents exist Fibertech should answer that none exist and not that the answer is "not applicable."

¹ Indeed, pursuant to the Ground Rules issued in this proceeding, Fibertech would appear obligated to file a formal request for confidential treatment with the Department. Ground Rules, D.T.E. 01-70, at 2 (October 16, 2001).

CONCLUSION

For all of the reasons set forth above, SELP requests that the Department issue an order compelling Fibertech to respond completely to the above-listed information requests. SELP respectfully seeks expedited treatment of this motion by the Department in order to prevent jeopardizing the existing procedural schedule in this matter.

Respectfully submitted,

SHREWSBURY'S ELECTRIC LIGHT PLANT

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CERTIFICATE OF COMPLIANCE

I, Diedre Lawrence, counsel for Shrewsbury's Electric Light Plant, do hereby certify that on November 19 and November 20, 2001, (at approximately 2:30 p.m. on both occasions) initiated telephone conferences with Cameron Kerry, Esq., and Kimberly Collins, Esq., counsel of record for Fiber Technologies Networks, LLC, for the purpose of attempting to narrow areas of disagreement on discovery matters, and that, despite the good faith efforts of the parties, no resolution has been reached as of the date of this motion.

Diedre T. Lawrence